In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-213

WERNER C. VON CLEMM, ET AL., PETITIONERS

v.

ROMANA ACOSTA BAÑUELOS, TREASURER OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the courts below erred in rejecting their challenge to the Attorney General's determination under the Trading with the Enemy Act that certain stones of German origin seized by the Alien Property Custodian in 1941 should not be returned to petitioners.

Petitioner Von Clemm brought suit in the United States District Court for the District of Massachusetts against the Treasurer and the Attorney General of the United States to compel the Attorney General to decide whether petitioner was the pre-vesting owner of certain property seized by the Alien Property Custodian during World War II as enemy property under the authority of the Trading

with the Enemy Act, 50 U.S.C. App. 1, *et seq.*[1] Petitioner also sought review of the Attorney General's determination under Section 32(a)(5) of the Act, 50 U.S.C. App. 32(a)(5), that a return of the vested properties to Von Clemm would not be in the national interest (App. 19).[2]

In 1943, Von Clemm filed an administrative claim with the Alien Property Custodian for the return of his property interests under Section 9(a) of the Act, and, after the 1946 addition of Section 32 to the Act (60 Stat. 50), he filed under that section too (App. 7). These administrative claims were consolidated with those of other parties who sought a return of the same vested properties, and were referred to a hearing examiner of the Office of Alien Property for a recommended decision (App. 16). Extensive hearings held in the mid-1950's on the consolidated claims resulted in a 1959 recommendation by the hearing examiner that the vested properties be returned to claimants other than petitioner Von Clemm (App. 17).

While these recommendations were awaiting review by the Director of the Office of Alien Property and the Attorney General, Von Clemm brought suit in the United States District Court for the Southern District of New York, seeking return of the vested properties under Section 9(a) of the Act. The suit, which raised *de novo* the questions previously considered by the hearing examiner (App. 7-8, 17), was dismissed after a protracted trial, the district court finding that Von Clemm was an "enemy" within the purview of the Act,

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[1]Named as co-plaintiffs in the suit were Bridge Import Company, a partnership formed in 1941 under the laws of the state of New York, in which petitioner Von Clemm owns a 75 per cent interest and is a general partner, and Rayford W. Alley, a special partner, who holds the balance of the partnership interest as trustee under a declaration of trust for the benefit of Von Clemm's children. These parties will be collectively referred to as "Von Clemm."

[2]"App." refers to the appendix to petitioners' brief in the court of appeals.

and lacked standing to sue. *Von Clemm* v. *Smith*, 255 F. Supp. 353 (S.D. N.Y.), affirmed, 363 F.2d 19 (C.A. 2), certiorari denied, 385 U.S. 975.

Proceedings before the Office of Alien Property on the consolidated claims were suspended while petitioner's Section 9(a) suit was before the courts. In 1969, the Claims Section of the Office of Alien Property moved to dismiss Von Clemm's administrative claim under Section 32(a) of the Act on the ground that a return of the vested properties to him would not be "in the interest of the United States" within the meaning of Section 32(a)(5) of the Act (App. 8, 18). The "national interest" question was briefed and argued before the Office of Alien Property (App. 19), and the matter was submitted to the Attorney General for his determination, as required by the regulations of the Office of Alien Property (*ibid.*). On March 22, 1971, the Attorney General ruled that a return of the property to Von Clemm would not be in the interest of the United States and therefore disallowed Von Clemm's claims under Section 32(a)(5) of the Act (App. 8, 19). The present action seeks judicial review of that determination.

The district court dismissed the suit on the authority of *Schilling* v. *Rogers*, 363 U.S. 666, 671, 676, holding that the administrative relief available under Section 32 of the Act was committed entirely to the Executive's discretion, and that, in consequence, the court lacked subject matter jurisdiction to review the Attorney General's denial of administrative relief (App. 26-38; 365 F. Supp. 477).

The court of appeals affirmed (Pet. App. 53-60). After reviewing at length what it termed Von Clemm's "long and arduous relationship with the Alien Property Custodian" (*id.* at 53), and the issues that were litigated by the petitioner in the mid-1960's in the Second Circuit under Sec-

tion 9(a) of the Act (*id.* at 56-57), the court held that the earlier suit had made available to Von Clemm full judicial review of the propriety of the seizure of the property and his entitlement to its return (*id.* at 58-59). In concluding that under established legal principles the earlier decision barred re-litigation of all issues that were, or could have been, litigated, the court said (*id.* at 59-60):

> That opportunity was not earlier seized to obtain a judicial ruling on * * * [Von Clemm's] constitutional assault on the proper burden of proof under §9(a) does not provide any basis for avoiding the ruling in *Schilling* that §32(a) relief is exclusively administrative and judicial review is foreclosed. The court below therefore properly ruled that it was without subject matter jurisdiction to review the claim.
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> We too are without jurisdiction to determine whether the district court in the Section 9(a) suit improperly required Von Clemm to bear an affirmative burden of proof. We note, however, that even if we had jurisdiction to consider its legal merits, * * * [Von Clemm's] claim, since it could have been presented to the second circuit on appeal from *Von Clemm* v. *Smith, supra,* would be barred by res judicata.* * *
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> The policies underlying the doctrine are well illustrated by this case. At some point litigation must terminate.

The court of appeals' decision of the narrow issues here is correct. Section 7(c) of the Act, 50 U.S.C. App. 7(c), provides that "[t]he sole relief and remedy of any person having any claim to any money or other property * * * transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act." The judicial remedy made available to persons like Von

Clemm is a suit under Section 9(a) of the Act, and Von Clemm availed himself of that remedy to its fullest extent. That a Section 9(a) suit affords a person constitutional protection is firmly established. *Societe Internationale* v. *Rogers*, 357 U.S. 197, 211; *Stoehr* v. *Wallace*, 255 U.S. 239, 245-246. Von Clemm should not be allowed to relitigate issues that were raised, or could have been raised, in the earlier Section 9(a) suit. There is no occasion to consider departing from the holding in *Schilling* that judicial review of the Attorney General's administrative determination under Section 32 of the Act is unavailable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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